

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Empowering Consumers to Prevent and)	CG Docket No. 11-116
Detect Billing for Unauthorized Charges)	
("Cramming"))	
)	
Consumer Information and Disclosure)	CG Docket No. 09-158
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170

**COMMENT OF THE
FEDERAL TRADE COMMISSION**

I. Introduction

The Federal Trade Commission ("FTC") is an independent administrative agency charged with promoting consumer protection, competition, and the efficient functioning of the marketplace. The keystone of the FTC's law enforcement mission is Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." The scope of Section 5 encompasses a wide range of business practices, including advertising, marketing, billing, and collection. Section 5 also authorizes the FTC to challenge "unfair methods of competition" as well as violations of other antitrust laws.

For more than fifteen years, the FTC has engaged in a sustained campaign to attack and prevent the placement of unauthorized charges on telephone bills, a practice known as "cramming." Working with federal and state law enforcement partners, the FTC has brought more than 25 enforcement actions to halt cramming and provide redress to its victims, conducted consumer and business education and outreach programs to raise awareness of the problem, and worked with the telecommunications industry to prevent and detect cramming. The FTC's enforcement cases, brought against crammers and the billing aggregators that facilitated the placement of unauthorized charges on consumers' bills, have resulted in stringent court orders and obtained tens of millions of dollars in consumer redress and refunded charges.

The FTC appreciates this opportunity to comment on the Federal Communications Commission's ("FCC") Notice of Proposed Rulemaking ("NPRM") concerning cramming,¹ and commends the FCC for its ongoing efforts to reduce cramming. The FCC's proposed rules attempt to limit cramming, in part, through improved telephone billing statement disclosures, an approach advocated by the FTC in its 2009 Comment filed in response to the FCC's Notice of

¹ Empowering Consumers To Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format, 76 FR 52625 (Aug. 23, 2011).

Inquiry. However, since filing its 2009 Comment, a comprehensive investigation and subsequent report by the Senate Committee on Commerce, Science, and Transportation (“Senate Staff Report”),² a public workshop on cramming held by the FTC on May 11, 2011 (“Cramming Forum”),³ and additional law enforcement experience⁴ have made it clear to the Commission that even improved telephone bill disclosures are unlikely to prevent the millions of dollars of consumer injury caused by cramming.⁵ To effectively tackle the cramming problem – which causes harm to an estimated 15-20 million American households each year⁶ – the FTC therefore respectfully urges the FCC to ban or require default blocking of some or all third-party billing.⁷

² Staff Report, Senate Committee on Commerce, Science, and Transportation, Unauthorized Charges on Telephone Bills (July 12, 2011) *available at* http://commerce.senate.gov/public/index.cfm?p=Reports&ContentRecord_id=ea101f28-4df5-4a3f-a63c-0eca043789be&ContentType_id=6a6fef64-34f1-4348-b965-ec03a1dcadfe&Group_id=a89b0b93-3242-4d2a-82da-5e916a62b6a9.

³ The FTC convened the Cramming Forum to identify creative solutions to the cramming problem. The FTC also solicited written comments from the public to supplement the Cramming Forum discussion. A transcript of the proceedings (“Cramming Forum Transcript”) and access to the comments are available at <http://www.ftc.gov/bcp/workshops/cramming>.

⁴ There have been numerous federal and state cramming enforcement actions since the FTC’s 2009 comment. *See, e.g., FTC v. Inc21.com*, 688 F. Supp. 2d 927 and 745 F. Supp. 2d 975 (N.D. Cal. 2010); *Main Street Tel. Co.*, Notice of Apparent Liability for Forfeiture, FCC 11-89, ¶ 16 (rel. June 16, 2011); *In the Matter of Cheap2Dial Telephone, LLC*, FCC 11-90, ¶ 18 (rel. June 16, 2011); *State of Kansas ex rel. v. Email Discount Network, LLC*, 10C582 (Kan. 3rd District Court, Shawnee County 2010); *State of Kansas ex rel. v. Voicemail Direct USA, LLC*, 10C581 (Kan. 3rd District Court, Shawnee County 2010); *State of Nevada, Office of the Attorney General, ex rel. v. The Payment People, Inc.*, 09C43110 (Nev. 1st Judicial District 2009).

⁵ The provisions of the FCC’s proposed rules discussed in this Comment – those concerning disclosure of the option to block third-party charges and the listing of third-party charges in separate sections – apply solely to landline bills. However, the FCC also requests comment on whether the proposed rules should extend to mobile phone bills. While the FTC has not examined the application of the FCC’s proposed rules in the mobile phone context, the Commission, as a general matter, supports efforts to provide clear disclosures to consumers. That said, with respect to cramming, the FTC’s law enforcement experience lies predominantly in the area of landline bills, which are the subject of the majority of consumer cramming complaints the FTC receives. Additionally, the technologies inherent to the mobile platform and other considerations may require a different analysis than that applied to landline third-party billing. Accordingly, the FTC limits its Comment to landline cramming. As consumers’ uses of mobile telephones, and in particular mobile payments, grows, the FTC and FCC should vigilantly monitor cramming complaints, scrutinize industry anti-cramming measures, and work with state law enforcement to determine whether further action is required. Such monitoring of mobile cramming complaints would be enhanced by the FTC’s recommendation to include the complaints in the Consumer Sentinel database. *See* Section V, Law Enforcement and Regulators Should Submit Complaints to Consumer Sentinel.

⁶ FCC Infographic on Cramming (Cramming Infographic), *available at* <http://transition.fcc.gov/cgb/cramminggraphic.jpg>.

⁷ Commissioner Rosch dissents from this comment to the extent that it recommends that the FCC “ban” third-party billing on landline telephone bills. Commissioner Rosch believes that the recommendation to require default blocking of some or all third-party billing, which would require carriers to block third-party billing unless and until a subscriber affirmatively authorizes such charges, is preferable. Default blocking of some or all third-party billing would be less restrictive than a complete ban, yet would be completely effective in addressing the cramming problem. In contrast to an across-the-board ban, it would allow for more flexibility, both for businesses and consumers. Not only would it give innovative (and legitimate) businesses the option to get consumer buy-in for third-party billing in appropriate circumstances, it would also allow informed consumers to choose this option if

Section II of this Comment describes the abuse of the third-party telephone billing system and scarcity of evidence of legitimate users. Section III explains that consumers are not likely to notice disclosures concerning third-party billing or the possible option to opt out. Section IV contains the FTC's recommendation, based on the important considerations in Sections II and III, that the FCC ban or require default blocking of some or all third-party billing. Section V of this Comment responds to the FCC's request for input concerning the sharing of cramming complaints by state and federal regulatory and enforcement authorities.

Because abuse of the third-party billing system is prevalent and evidence of legitimate uses of the system are scarce, and because the proposed improved disclosures are unlikely to address cramming effectively, the FTC respectfully requests that the FCC ban or require default blocking of some or all third-party billing. Also, because of the scope of the cramming problem and the large number of regulatory and enforcement agencies charged with addressing the problem, the FTC recommends that state and federal agencies use the Consumer Sentinel Network ("Consumer Sentinel") as a central repository and shared database for cramming complaints lodged by consumers and businesses.

II. Background

A. Abuse of the Third-Party Billing System is Widespread.

The evidence gathered by the staff of the Senate Commerce Committee in its cramming investigation demonstrated the pervasive nature of the cramming problem on the third-party telephone billing platform. The Committee sought information from seven telephone billing auditing companies in the United States. These companies audit the telephone bills of their clients to discover and dispute unauthorized charges. Information provided by the auditing companies showed that "almost all of the third-party charges they identified on their clients' bills – more than 300,000 – were not authorized by their clients."⁸ Committee staff also contacted a random sample of more than 500 telephone customers who had been charged by certain third-party merchants to interview them about their experiences with the merchants. "Not a single individual or business owner reported that they had authorized the third-party vendors' charges on their telephone bills."⁹

B. There is a Scarcity of Evidence of Legitimate Use of Third-Party Billing.

To date, FTC staff has been able to identify very few legitimate uses of third-party telephone billing. At the FTC's Cramming Forum, no third-party merchants presented data

they so desired. Furthermore, as discussed in footnote 5, developments with respect to third-party billing in the mobile telephone context are still evolving. To the extent that the mobile marketplace is able to address consumer protection issues related to third-party billing, these developments may also be applicable to landline third-party billing.

⁸ Senate Staff Report, *supra* note 2, at 21.

⁹ *Id.* at 29.

showing the legitimacy of their charges or the necessity of having charges placed on a telephone bill. Representatives of the telephone industry provided only two examples of legitimate third-party merchants.¹⁰ Nor did any third-party merchants submit comments advocating for the importance of this billing platform, despite the FTC's call for comments from interested parties. The silence of merchants who use third-party telephone billing calls into question the extent of legitimate third-party billing.

This experience is consistent with the Senate Commerce Committee staff's findings and the FCC's own data. During its exhaustive investigation of cramming, the Commerce Committee staff was unable to identify a legitimate use of the platform and instead found that many third-party vendors were illegitimate and created solely to exploit third-party billing.¹¹ Furthermore, the FCC's own data suggests that crammers are the prime users of third-party billing; an FCC investigation discovered that only 20 of 17,384 consumers actually used the third-party service for which they were charged. That figure equates to a 0.1% usage rate.¹²

III. Disclosures are Unlikely to be Noticed and Will Not Solve the Cramming Problem.

The FCC's proposed rules would require carriers that offer the option of blocking third-party charges at the consumer's request to provide clear and conspicuous notice of the option at the point of sale, on each telephone bill, and on each carrier's web site. Some carriers, particularly large carriers (e.g., AT&T and Verizon), currently offer third-party billing blocks voluntarily, but nothing in the proposed rule would require them to continue to offer this service. Moreover, some smaller telecommunications companies do not give subscribers an option to block third-party charges. The NPRM requests comment on whether the proposed rules should be modified to require all carriers to offer the option of third-party billing blocks. As explained below, even if all carriers were required to offer the option to block third-party billing, it is unlikely that this would result in a substantial reduction in cramming practices, or consumer injury caused by such practices.

The proposed disclosure of consumers' option to block third-party billing is unlikely to be effective because consumers are frequently unaware of the potential for third parties to place charges on their telephone bills, and thus are unlikely to look for and comprehend the significance of the disclosed information. For this reason, even if the charges are placed in a separate billing section, as proposed in the FCC rulemaking, it is unlikely to result in a significant decrease in cramming. Moreover, because cramming charges are often for small

¹⁰ The two examples offered were America Online and an entity called "Lizard Games." Other unspecified broadband and Internet services were also mentioned. *See* Cramming Forum Transcript, *supra* note 3, at 96-97 (Don Teague and Kent Wardin); ILD Teleservices, Comment No. 00022, *supra* note 3.

¹¹ *See* Senate Staff Report, *supra* note 2.

¹² Cramming Infographic, *supra* note 6.

amounts, consumers are unlikely to be alerted to the risk of cramming when they see the total amount due on their bills.¹³ And, with the increased use of automatic bill payment programs, it is likely that many consumers pay their telephone bills without ever checking the details of the charges appearing in a multi-page bill.¹⁴

Two recent FTC enforcement actions against fraudulent crammers demonstrate the limitations of the FCC's proposal. In both *Nationwide Connections* and *Inc21*, third-party charges were placed on a separate page at the end of a consumer's telephone bill. In *Nationwide Connections*, a convicted felon who ran a cramming operation from his jail cell, placed millions of fabricated collect-call charges on consumers' telephone bills through the third-party billing platform. Although the bogus charges were placed on a separate bill page, the crammers and billing companies still managed to collect more than \$34 million from consumers for those charges.¹⁵ In *Inc21*, a marketing research expert conducted a survey of customers who had been charged on a separate page on their telephone bills for the defendants' products and services. Of the more than one thousand customers surveyed, only 5 percent were aware that they had been billed for the defendants' products and services and 97 percent said they had never agreed to purchase the defendants' products.¹⁶ In finding that the consumers in that case could not reasonably avoid the crammed charges, the court reasoned that "given the evidence that nearly 97 percent of defendants' 'customers' never agreed to purchase defendants' products in the first place, it follows that these 'customers' had no reason to scrutinize their telephone bills for defendants' fraudulent charges."¹⁷

IV. The FCC Should Ban or Require Default Blocking of Some or All Third-Party Billing.

The FTC respectfully requests that the FCC ban or require default blocking of some or all third-party billing.¹⁸ Neither approach would depend on consumers taking affirmative action to prevent injury from a form of billing many consumers are not aware of and routinely fail to notice even as it is occurring, and even if it is disclosed on a billing statement.

Third-party billing on phone bills has become almost solely a vehicle for defrauding consumers and businesses. Accordingly, the first approach would ban third-party billing on

¹³ See, e.g., *Inc21*, 745 F. Supp. 2d at 1004 ("losses incurred by individual customers [were] relatively small"); *FTC v. Nationwide Connections, Inc.*, No. 06-80180 (S.D. Fla. filed Feb. 27, 2006) (charges were between \$5 and \$8); Cramming Infographic, *supra* note 6 (charges from a single vendor per month can range from \$1.99 to \$19.99).

¹⁴ See Cramming Forum Transcript, *supra* note 3, at 209-10.

¹⁵ *Nationwide Connections*, No. 06-80180.

¹⁶ *Inc21*, 745 F. Supp.2d at 1001 (granting the FTC's motion for summary judgment).

¹⁷ *Id.* at 1004.

¹⁸ See *supra* note 7.

telephone bills. Such a ban could apply to all third-party billing or provide exceptions for demonstrated legitimate uses of third-party telephone billing.¹⁹

The second, alternative approach would require that all carriers block third-party charges on subscribers' bills until a subscriber affirmatively authorizes such charges.²⁰ If the subscriber wished to have third-party goods or services billed on the account, he or she would specifically authorize the telephone company to lift the block – either to allow all third-party billing or to authorize billing from specific merchants. Under this approach, consumers would not have the burden of discovering the need for and the existence of a third-party billing block option. Instead, the block would be in place automatically, and specific subscriber consent would be required to lift it. This approach would allow any legitimate users of the third-party telephone billing platform to obtain the informed consent of consumers to be charged for their goods and services.²¹

V. Law Enforcement and Regulators Should Submit Complaints to Consumer Sentinel.

The FCC requested input concerning the sharing of cramming complaints by state and federal regulatory and enforcement authorities. Multiple state and federal agencies regulate or bring enforcement actions against crammers. To ensure the most efficient deployment of resources, state and federal regulators and enforcement authorities must readily share their cramming complaints. The FTC invites the FCC and state regulators to submit all cramming complaints relating to both landline and mobile bills to Consumer Sentinel and to actively search Consumer Sentinel for cramming complaints.²² Consumer Sentinel provides a secure vehicle where complaints can be shared among law enforcement, ensuring that complaints filed with one agency are quickly made available to all Consumer Sentinel members.²³ Consumer Sentinel already contains complaints filed directly with the FTC, along with complaints submitted by

¹⁹ An example of this approach is the law banning third-party telephone billing enacted by the state of Vermont this year. 9 V.S.A. § 2466, *available at* <http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=09&Chapter=063&Section=02466>. The Vermont law excepts three specific categories of third-party billing from the prohibition: (A) billing for goods or services subject to the jurisdiction of the state public service board; (B) billing for direct dial or dial around services initiated from the consumer's telephone; and (C) operator-assisted telephone calls, collect calls, or telephone services provided to facilitate communication to or from correctional center inmates. 9 V.S.A. § 2466(f)(1). As part of consideration of a third-party billing ban, the FCC could seek comments from industry and other interested parties regarding specific categories of third-party billing for which an exemption from such a ban might be warranted.

²⁰ The NPRM asks for comments concerning “the impact, both positive and negative, that prohibiting third-party charges on wireline telephone bills, unless the subscriber opts in, may have on wireline companies, subscribers, and third parties.” NPRM, *supra* note 1, at 52626.

²¹ Consumers who do opt in to allow certain third-party charges would likely benefit from improved billing disclosures such as those proposed by the FCC.

²² Currently, the FCC has access to view complaints in Consumer Sentinel, but it does not contribute to Consumer Sentinel the cramming complaints it receives from consumers.

²³ Information regarding Consumer Sentinel is available at <http://www.ftc.gov/sentinel/factsheet.pdf>.

most Better Business Bureaus, the US Postal Inspection Service, and numerous other contributors. The FTC is willing to work with other recipients of cramming complaints to enable them to contribute their complaint data.

VI. Conclusion

For over 15 years the FTC, along with its federal and state law enforcement partners, has worked to prevent the placement of unauthorized third-party charges on consumers' bills, a practice that has caused millions of dollars in consumer injury. Through its rulemaking, the FCC has the opportunity to reduce substantially a costly and pervasive form of consumer fraud. The FTC respectfully requests that the FCC ban or require default blocking of some or all third-party billing through telephone bills. Also, because effective action against crammers requires cooperation among law enforcers at all levels, the FTC welcomes and encourages federal and state regulators and enforcement agencies to contribute cramming complaints to Consumer Sentinel and to utilize Consumer Sentinel data to identify and develop cases against crammers.

By Direction of the Commission.